88-225

No. .....

In The

Supreme Court of the United States

October Term, 1988

—o—

FRANK B. SHAVER,

Petitioner,

vs.

F.W. WOOLWORTH COMPANY,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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July, 1988

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QUESTION PRESENTED

Whether, upon the dismissal of a federal claim on its merits in federal court, the concurrent dismissal of a related state-law claim for want of the exercise of pendent jurisdiction bars litigation of the same state-law claim pursuant to principles of federal *res judicata* in a subsequent suit initiated in state court but removed to federal court on diversity grounds, where the plaintiff failed to allege diversity jurisdiction in the original federal suit?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Frank B. Shaver, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 2, 1988, rehearing *en banc* denied May 5, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sustaining the decision of the United States District Court for the Eastern District of Wisconsin is reported at 840 F.2d 1361 (7th Cir. 1988) and is reprinted at pp. A-1 to A-16 of the Appendix to this Petition.

The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 669 F.Supp. 243 (E.D. Wis. 1986) and is reprinted at pp. A-24 to A-34 of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision, opinion, and judgment on March 2, 1988, sustaining the decision of the United States District Court for the Eastern District of Wisconsin. That Court denied plaintiff's petition for rehearing *en banc* by an 8-3 margin on May 5, 1988.

The jurisdiction of this Court to review the decision, opinion, and judgment of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Frank B. Shaver was employed by F.W. Woolworth Company for over 20 years.[1] On or about September 24, 1982 the company announced that it would close its Woolco division, which consisted of 336 stores. At the time that decision was made, Mr. Shaver was employed at Woolworth's Central Accounting Office (CAO) in Milwaukee, Wisconsin as a leasing specialist. The Woolco liquidation effected a major reduction-in-force, including the layoff of 183 of the 673 employees in the CAO. On October 27, 1982, Mr. Shaver was one of a group of people who were notified that they would be laid off at some point in the ensuing several months. Many of the affected employees, including Mr. Shaver, were asked to remain for periods of time, depending upon the circumstances, to assist in the winding-down process. Mr. Shaver's last day of work was June 30, 1983.

Mr. Shaver executed an application statement at the time of his Woolworth employment at the C.A.O. that provided:

> On my engagement by F.W. Woolworth Co., this application is evidence that I agree *to conform to the rules and regulations of F.W. Woolworth Co.*, that my engagement can be terminated at any time by F.W. Woolworth Co., I being likewise at liberty to so terminate it. Any agreement entered into between the company and the applicant is predicated upon truth-

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[1] The statement of the facts is taken from the opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin. See App. A-1 to A-34.

> fulness of the statements herein contained. [Emphasis supplied.]

Mr. Shaver's employment at the C.A.O. was initially guided by a booklet that provided:

> Like most organizations with long histories, we have developed policies and procedures that years of experience have proven to be productive. This booklet will assist you in understanding some of these policies and procedures, and will explain many aspects of your duties in the Central Accounting Office. *It will tell you what we expect from you, and what you may expect from us.* [Emphasis supplied.]

In March, 1982 that booklet was replaced by a successor F.W. Woolworth Central Accounting Office Employee Handbook for which Mr. Shaver was required to verify his receipt on a written acknowledgement form that provided:

> This will verify that I have received a copy of the Employee Handbook with details of benefits and policies for the employees of the F.W. Woolworth Central Accounting Office.

Mr. Shaver signed the form and returned it as directed to the C.A.O. personnel department. Page 1 of the Employee Handbook contained virtually the identical language as its predecessor:

> This booklet will assist you in understanding our policies and procedures, and will explain many aspects of your duties in the Central Accounting Office. *It will tell you what we expect from you, and what you may expect from us.* [Emphasis supplied.]

At p. 12 the Employee Handbook provided that:

> Your seniority is important to you and to the Central Accounting Office and it means the length of time you have worked for us since your most recent date of hire. Seniority, along with ability and performance, is an important factor for job transfer and promotion opportunities. In the history of the C.A.O., the need to reduce the number of employees has occurred on rare occasions—and even then, only a few employees were affected. *It is important for you to know that if a reduction of staff should be necessary, lay-off and recall after lay-off will be determined on the basis of seniority and an employee's skill and ability to do the available work. Where the factors are relatively equal among several employees, those with the greatest seniority will be given preference over those employees with less seniority.* [Emphasis supplied.]

Mr. Shaver contended that the statements contained in the Employee Handbook created a contract between F.W. Woolworth Company and himself, and that Woolworth breached that contract when it laid Mr. Shaver off without following the seniority provisions contained in the handbook. As the Court of Appeals recognized, the deposition testimony of Woolworth officials supported Mr. Shaver's contention that Woolworth failed to follow the handbook's seniority provisions during the layoff of the Central Accounting Office employees.

On May 2, 1984, Mr. Shaver commenced an action in the United States District Court for the Eastern District of Wisconsin (*Shaver I*), in which he alleged *inter alia* that his termination violated ADEA. Mr. Shaver's complaint in that action also joined *inter alia* his state-law handbook claim and invoked the pendent jurisdiction of the

trial court. On August 21, 1985 the trial court granted F.W. Woolworth Company's motion for summary judgment on the basis that Mr. Shaver failed to file his underlying federal ADEA charge timely. In addition, the trial court declined to exercise pendent jurisdiction over the state-law claims. Thus, the dismissal of the federal ADEA claim was on the merits, while the dismissal of the state-law pendent claims was not on the merits. Although the parties in *Shaver I* briefed and presented to the trial court all the state-law pendent claims for decision on the merits, neither specifically invoked the diversity jurisdiction each knew existed. No appeal was taken by Mr. Shaver from the judgment entered in *Shaver I*.

Mr. Shaver then commenced on February 13, 1986 a second lawsuit against F.W. Woolworth Company, this time in the Circuit Court for Milwaukee County, Wisconsin also alleging breach of his Employee Handbook contract of employment. (*Shaver II.*) F.W. Woolworth Company, over Mr. Shaver's objection and petition for remand, successfully removed the Milwaukee County Circuit Court lawsuit to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. §§ 1332 and 1441 on the basis of diversity of citizenship. Upon the completion of discovery in that action F.W. Woolworth Company moved for summary judgment on the Employee Handbook contract of employment claim upon the basis of a variety of arguments on the merits and furthermore that Mr. Shaver's action was barred under the doctrine of *res judicata* due to his failure to have invoked mandatory diversity jurisdiction in *Shaver I*. The United States District Court for the Eastern Division of Wisconsin agreed with F.W. Woolworth Company's

substantive argument that the terms of the Employee Handbook did not impose a contractual limitation upon the employer's right to terminate Mr. Shaver's employment, refrained from deciding F.W. Woolworth Company's *res judicata* argument, and entered judgment in favor of F.W. Woolworth Company and against Mr. Shaver on the merits of his employment contract action. App. A-24 to A-34.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit. That Court decided by a 2-1 margin that the doctrine of *res judicata* barred *Shaver II* because Mr. Shaver had not invoked the mandatory diversity jurisdiction of the trial court in *Shaver I* upon that court's dismissal of his employment handbook contract claim for want of the exercise of pendent jurisdiction. The majority reasoned that ". . . both the strict test of and the policy behind the *res judicata* doctrine bars the present action." The majority acknowledged that the result reached presented a hardship but stated that:

> Whatever hardship that may inhere in this result could have been avoided. Since Shaver originally chose the federal court as his forum, he should have, under the well-reasoned rule against claim-splitting, included all the relevant theories of relief in a single action that the federal forum provides. Both the federal court's diversity jurisdiction and the broad joinder provisions of the Federal Rules of Civil Procedure provided Shaver the opportunity to pursue his state law claims at the same time as his federal ADEA claim. His failure to pursue those claims in the forum originally selected precludes him from taking a second bite of the apple.

The majority reasoned *inter alia* that the district court's decision in *Shaver I* constituted a decision "on the merits"

even with regard to the trial court's decision to refrain from the exercise of pendent jurisdiction over the state-law claim.

Judge Richard Cudahy dissented from the majority's opinion reasoning that its decision was unprecedented, contrary to the dictates of *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), and conceptually misguided because the trial court, not the plaintiff, in *Shaver I* had caused the "splitting" of claims, and in any event a plaintiff is never obliged to invoke diversity jurisdiction especially as to matters of developing state common law. Judge Cudahy also opined that the majority's rationale offended principles of federal-state comity and was "swimming upstream" by expanding federal jurisdiction over state law. App. A-16 to A-24.

Plaintiff sought rehearing *en banc* which was denied by an 8-3 margin of the active judges of the United States Court of Appeals for the Seventh Circuit, Judges Cudahy, Flaum, and Ripple dissenting. App. A-36 to A-37.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN UNITED MINE WORKERS V. GIBBS.

In *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966) this Court noted that state-law claims unde-

cided by a district court due to its discretionary determination to decline the exercise of pendent jurisdiction must be dismissed without prejudice to their subsequent presentation on the merits in state court. Because the majority judges of the Court of Appeals in this case reached out to decide the *res judicata* question, an erroneous assumption was made that the element of federal *res judicata* law that requires "a final judgment on the merits in an earlier action" had been satisfied. However, because the trial court in *Shaver I* never reached the merits due to its decision to decline pendent jurisdiction, there had not been a decision on the merits with respect to the state-law breach of employment contract claim. E.g., *Nilsen v. City of Moss Point*, 674 F.2d 379 at 385 and authorities therein cited and discussed (5th Cir. 1982). Accordingly, because the decision of the Court of Appeals mischaracterizes the pendent jurisdiction dismissal in *Shaver I* as "on the merits," it directly conflicts with the decision of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

II. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT EXTENDS THE DECISION OF THIS COURT IN FEDERATED DEPARTMENT STORES, INC. V. MOITIE BEYOND ITS HOLDING AND CONTRARY TO ITS DICTATES.

In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) this Court applied principles of federal *res judicata* law to bar the relitigation in federal court of an unappealed prior judgment dismissing the plain-

tiff's federal anti-trust claims. However, this Court expressly declined to decide the question of whether the plaintiff's unpresented but related state-law claims in *Moitie* were also barred by federal *res judicata*. Justice Blackmun, concurring, 452 U.S. at 404 and Justice Brennan, dissenting, 452 U.S. at 410-11 concluded that *res judicata* should have been extended to bar subsequent litigation of the unpresented but related state-law claims. However, Justice Blackmun specifically and Justice Brennan by implication recognized an exception to preclusion where the original action had not been decided on its merits due, for example, to the district court's decision to decline the exercise of pendent jurisdiction. Thus, *Moitie* recognized the application of the Restatement (2d) of Judgments, § 61.01, comment e at 160 (Tent. Draft No. 5 1978), to a case, such as this one, where the original dismissal was predicated upon a discretionary refusal to exercise pendent jurisdiction. The majority of the Court of Appeals cited and discussed *Moitie* but simply ignored that part of the decision most directly applicable to this case.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE RATIONALE OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THE RATIONALE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN NILSEN V. CITY OF MOSS POINT.

In *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 563 (5th Cir. 1983) the Fifth Circuit decided that where "splitting" of claims occurs by virtue of a decision of the trial court rather than of the litigant, no *res judicata* bar should apply to the second action. Thus, in *Nilsen* the

Fifth Circuit reasoned that where a failure to pursue state claims on the merits was attributable to the district court's decision to decline the exercise of pendent jurisdiction federal *res judicata* would not bar the subsequent action. That decision conflicts with the decision of the Court of Appeals in this case.

IV. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BURDENS THE ADMINISTRATION OF JUSTICE IN THE FEDERAL TRIAL COURTS AND OFFENDS PRINCIPLES OF FEDERAL-STATE COMITY.

The Court of Appeals majority relied principally upon its extension of the Seventh Circuit's prior decision in *Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981), which requires a plaintiff in federal court to append all related state-law claims to his federal claim, thereby avoiding "splitting" of related claims and duplicative litigation. The majority extended the *Harper* rationale to the instant case even though this plaintiff had complied with *Harper* and the district court had for discretionary reasons declined to exercise jurisdiction to proceed to the merits of the plaintiff's state-law claims. The majority's rationale in *Shaver II* converts judicially controllable discretionary jurisdiction into mandatory jurisdiction, deprives plaintiffs of their prerogative to choose their initial mandatory forums for the decision of state-law claims, and eliminates trial court discretion whether to exercise jurisdiction over state-law claims. Thus, the decision plainly creates a substantial and unnecessary increase in federal jurisdiction over state-law claims, sub-

stantially increases the case load of the district courts in the Seventh Circuit, and denies plaintiffs the choice of forum otherwise available to them. All this is accomplished without any basis in existing precedent whatsoever, contrary to the suggestion in *United Mine Workers v. Gibbs, supra* at 726 that decisions of developing state law should be especially avoided as a matter of comity and in order to procure for litigants a sure-footed reading of state law, and as Judge Cudahy noted, "swimming upstream in terms of much current thinking about diversity jurisdiction." App. A-20 & n.1. See *"The Future of Diversity Jurisdiction,"* Bator, et al., Hart & Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM, Ch. 13, § 5 at pp. 1695-1700 (Foundation Press 3rd Ed. 1988).

—o—

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the opinion, decision, and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

July, 1988

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1043
Frank B. Shaver,

Plaintiff-Appellant,

v.

F.W. Woolworth Co.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 86 C 285—Thomas J. Curran, *Judge*

Argued May 26, 1987—Decided March 2, 1988

Before Wood, Jr., Cudahy, and Coffey, *Circuit Judges.*

Coffey, *Circuit Judge.* Plaintiff-appellant Frank B. Shaver appeals the district court's grant of summary judgment in favor of the defendant-appellee F.W. Woolworth Company on his claim that Woolworth breached its contract of employment with him. We affirm.

I.

On September 24, 1982, the F.W. Woolworth Company ("Woolworth") announced that it would close its

Woolco division, consisting of 336 stores. At the time of the announcement, plaintiff-appellant Frank Shaver ("Shaver") worked as a leasing specialist at Woolworth's Central Accounting Office ("CAO") in Milwaukee, Wisconsin. The Woolco shut-down resulted in the layoff of 183 employees in the CAO. On October 27, 1982, company officials informed Shaver at a group meeting that he was among a group of employees that would be laid off during the next several months. Woolworth asked some of those employees, including Shaver, to remain for a period of time to assist in the winding down process. Shaver was terminated on June 30, 1983.

Shaver began his employment with Woolworth in September, 1962. Upon his transfer to the CAO in June, 1972, Shaver filled out an employment application and signed his name to the following statements:

> "On my engagement by F.W. Woolworth Company, this application is evidence that I agree to conform to the rules and regulations of F.W. Woolworth Company, that my engagement can be terminated at any time by F.W. Woolworth Company, I being likewise at liberty to so terminate it. Any agreement entered into between the Company and the Applicant is predicated upon truthfulness of the statements herein contained."

A booklet given to Mr. Shaver by Woolworth initially governed the terms of Mr. Shaver's employment at the CAO. It provided in part:

> "Like most organizations with long histories, we have developed policies and procedures that years of experience have proven to be productive. This booklet will assist you in understanding some of these policies and procedures, and will explain many aspects of

> your duties in the Central Accounting Office. *It will tell you what we expect from you, and what you may expect from us.*"

(Emphasis added). In March, 1982, a CAO employee handbook replaced the prior booklet. Documents submitted in response to Woolworth's motion for summary judgment establish that Mr. Shaver verified his receipt of the handbook on a written acknowledgment form, and returned it to the CAO personnel department. The first page of the handbook contained virtually the identical language as its predecessor:

> "This booklet will assist you in understanding our policies and procedures, and will explain many aspects of your duties in the Central Accounting Office. It will tell you what we expect from you, and what you may expect from us."

At page 12, the employee handbook contained the following seniority layoff provision:

> "Your seniority is important to you and to the Central Accounting Office and it means the length of time you have worked for us since your most recent date of hire. Seniority, along with ability and performance, is an important factor for job transfer and promotion opportunities. In the history of the CAO, the need to reduce the number of employees has occurred on rare occasions—and even then, only a few employees were affected. It is important for you to know that if a reduction of staff should be necessary, layoff and recall after layoff will be determined on the basis of seniority and an employee's skill and ability to do the available work. *Where the factors are relatively equal among several employees, those with the greatest seniority will be given preference over those employees with less seniority.*"

(Emphasis added). The handbook concluded:

> "In closing, the information in this handbook has been prepared as a convenient reference for your use at work or at home. These are today's policies and rules —it is safe to say, our practice is to continually review and revise them as needed—always keeping in mind the needs of the people who make up the organization."

At trial, Shaver contended that the statements contained in the employee handbook created a contract between Shaver and Woolworth, a contract Woolworth breached when it laid off Shaver without following the seniority provisions contained on page 12 of the handbook. The deposition testimony of CAO officials supports Shaver's argument that Woolworth failed to follow the handbook's seniority provision during the layoff of CAO employees. As an example, Les Zoch, general manager and controller of the CAO, testified that in determining which employees to lay off, Woolworth officials did not discuss the possible applicability of the seniority provisions due to the press of time and the need to "cut to the bone." Further, Gerald Nelson, CAO salary administrator at the time of the layoffs, testified that Zoch told him that because the Woolco closing was a "rather unique situation," Woolworth did not apply the seniority provisions to the layoffs.

On May 2, 1984, Shaver commenced an action in federal district court (*Shaver* I), alleging that his discharge violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Shaver's complaint also joined pendent state claims. On August 21, 1985, the trial judge granted Woolworth's motion for summary judgment on the ground that Shaver failed to file his fed-

eral ADEA claim timely; further, the court declined to exercise pendent jurisdiction over the remaining state claims. Shaver neither attempted to allege an alternative jurisdictional basis in an attempt to pursue his state law contract claims, nor did he appeal the court's entry of judgment in Woolworth's favor.

Subsequently, on February 13, 1986, Shaver filed a second lawsuit against Woolworth, this time in the Circuit Court for Milwaukee County, Wisconsin, alleging breach of contract and negligent employment termination under Wisconsin law, as well as a violation of the Wisconsin Fair Employment Practices Act. Woolworth, over Shaver's objection, successfully removed the lawsuit to federal court pursuant to 28 U.S.C. §§ 1332, 1441 on the basis of diversity of citizenship. Woolworth moved for summary judgment with respect to each of Shaver's claims after the parties had completed their supplemental discovery. In its motion, Woolworth argued that it was entitled to summary judgment on the merits, and furthermore Shaver's action was barred under the doctrine of *res judicata*. The district court, agreeing with Woolworth's substantive argument that the terms of the employee handbook did not impose a contractual limitation on Woolworth's right to terminate Shaver's employment, entered judgment in favor of Woolworth, but did not address Woolworth's contention that the second lawsuit was foreclosed under *res judicata* principles.

II.

Although the district court did not consider the issue, we believe that before attempting to resolve issues involving the state law of Wisconsin (Shaver's claims for

breach of contract and negligent employment termination under Wisconsin law), it is appropriate to address Woolworth's argument that the doctrine of *res judicata* bars this lawsuit: Shaver's second action against Woolworth. Woolworth maintains that *res judicata* operates to forbid this action because in *Shaver* I, Shaver could have, but chose not to, allege the existence of an alternative basis for subject matter jurisdiction after the district court dismissed his pendent state claims along with his federal ADEA claim. According to Woolworth, once the federal court dismissed Shaver's federal claim, he could have alleged diversity of citizenship as a jurisdictional basis[1] in order that he might pursue any state law theories of recovery arising out of the same occurrence, and under the doctrine of *res judicata* his failure to pursue state law claims for relief prevents him from attempting to litigate those claims in the present lawsuit.

Woolworth's contention—that Shaver's failure to allege the existence of diversity jurisdiction in *Shaver* I bars this state law breach of contract action—relies on the crucial distinction between the preclusive effect of *res judicata* and collateral estoppel. In contrast to collateral estoppel, which bars issues *actually litigated and decided* in a previous lawsuit, the doctrine of "*res judicata* bars

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[1] The record establishes that Shaver in fact knew that diversity jurisdiction existed in the prior age discrimination lawsuit. As part of his discovery in *Shaver I*, Shaver inquired into the factual basis for Woolworth's denial of diversity jurisdiction. In its response, Woolworth stated that it had not denied the existence of diversity jurisdiction, and explained its belief that diversity jurisdiction did exist. Nevertheless, Shaver did not amend his complaint to include diversity of citizenship as a jurisdictional basis.

not only those issues which were actually decided in the prior action but also any issues which *could have* been raised." *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982) (*citing Whitley v. Seibel*, 676 F.2d 245, 248 (7th Cir. 1982) (emphasis added). Woolworth's argument requires us to determine whether or not a plaintiff who initially sues in federal court must attempt to join all theories of relief arising under state law in a single proceeding if and when a jurisdictional basis for doing so exists.

In determining whether or not Shaver's prior Age Discrimination suit (based on the same core of operative facts as this lawsuit) bars him from maintaining this state law cause of action, we note the holding of *Matter of Energy Cooperative, Inc.*, 814 F.2d 1226, 1230 (7th Cir.), *cert. denied*, 108 S. Ct. 294 (1987): when "the prior litigation was brought in federal court, the federal rule of *res judicata*" applies. The Court in *Brown v. J.I. Case Co.*, 813 F.2d 848 (7th Cir.), *cert. denied*, 108 S. Ct. 258 (1987) set forth the essential elements of *res judicata* as "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or privies in the two suits." 813 F.2d at 854 (quoting *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982)). The parties fail to discuss these three requirements in their briefs, and for reasons we cannot understand, instead focus on the question of whether or not *res judicata* should extend to the factual situation before us as a matter of public policy. This approach is ill-advised for "[o]nce a litigant satisfies the prongs of the test, a later suit should be barred since

there is little, if any, room left for making further policy arguments." *Smith v. City of Chicago,* 820 F.2d 916, 917 (7th Cir. 1987) (citing *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 392, 401, 101 S. Ct. 2424, 2429 (1981)).

In *Moitie,* the Supreme Court stressed that:

> "'[*the*] *doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours, it is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts . . . .' Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299, 37 S. Ct. 506, 507, 61 L.Ed. 1148 (1917). The language used by this court half a century ago is even more compelling in view of today's crowded dockets: 'The predicament in which respondent finds himself is of his own making . . . .
>
> [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the established precedent for so disregarding this salutory doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.' *Reed v. Allen,* 286 U.S. at 198-199, 52 S. Ct. at 533."

452 U.S. at 401-02, 101 S. Ct. at 2429 (emphasis added). In light of these legal parameters, we refuse to depart from traditional *res judicata* doctrine when and if the requirements of the doctrine are met. It is essentially undisputed that the first and third elements of *res judicata* are satisfied in this case: a final judgment on the merits was rendered in the previous action between the parties

to this lawsuit. We analyze whether the causes of action are identical.

This court recently held that federal law defines a single "cause of action" as " 'a core of operative facts' which give rise to a remedy," *In the Matter of Energy Cooperative, Inc.*, 814 F.2d at 1230-31 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986)). That case also approved the approach of section 24 of the Restatement (Second) of Judgments (1982): "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost." *Id.*

As noted previously, *res judicata* operates as a bar to the litigation of matters that could have been raised in a prior proceeding. *Lee*, 685 F.2d at 198. This application of the doctrine of *res judicata* prevents the splitting of a single cause of action and the use of several theories of recovery as the basis for separate suits. *See Button v. Harden*, 814 F.2d 382, 384 (7th Cir. 1987). Hence, the federal definition of a cause of action, when combined with the rule against claim-splitting, requires that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future.

Applying the federal definition of a "cause of action" to the case at hand, plaintiff's prior age discrimination lawsuit and the instant breach of contract action arise out of the same core of operative facts, Woolworth's liquidation of Woolco and Shaver's layoff. Since the two lawsuits involve this single core of operative facts, they constitute identical causes of action for *res judicata* purposes.

Although this single group of facts may conceivably give rise to different claims for relief upon different theories of recovery, under the federal definition a single cause of action remains. *See Lee,* 685 F.2d at 200. Thus, the federal *res judicata* doctrine precludes Shaver from litigating any matters that he could have raised in the previous lawsuit.

In an attempt to circumvent the doctrine's application and despite the presence of the three doctrinal elements, Shaver relies on a policy argument. Shaver asserts, *inter alia,* that requiring a plaintiff to allege the possible existence of federal diversity jurisdiction to pursue state law claims once pendent to federal claims after both the federal and state claims are dismissed runs counter to the federal policy of leaving primarily state law questions to the state courts. Although not completely analogous on its facts, this court's decision in *Harper Plastics v. Amoco Chemical Corp.,* 657 F.2d 939 (7th Cir. 1981), answers Shaver's argument.

In *Harper,* the court considered whether *res judicata* bars a litigant from bringing a contract claim in state court following a dismissal on the merits of his federal antitrust claim where the litigant did not join the contract claims in the original federal action pursuant to the court's pendent jurisdiction. As Shaver does here, the plaintiff in *Harper* argued that it is unfair to require a plaintiff to join state theories of relief in a federal complaint where those state claims could only be entertained under the doctrine of pendent jurisdiction. Moreover, the plaintiff asserted that because pendent jurisdiction is discretionary, a plaintiff cannot know with certainty that the federal court will elect to hear pendent claims, and there-

fore a plaintiff should not be expected to plead them all. Finally, the plaintiff argued that in light of burgeoning court dockets, federal policy should not operate to "force" pendent state claims on the federal courts.

The Court of Appeals rejected the plaintiff's contentions, holding that "[w]e fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding." 657 F.2d at 946. The court explained:

> "*The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources.* If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder . . . .
>
> A dismissal of the claims for relief under federal law in a complaint to which pendent state claims have been joined does not of itself end the litigation. '[I]f it appears that the state issues predominate, whether in terms of proof, of the scope of issues raised, or the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.' *United Mineworkers v. Gibbs*, 383 U.S. at 727, 86 S. Ct. at 1139. Conversely, if the district judge find that the federal claims are insubstantial, the entire action may be dismissed and the plaintiff will be permitted to pursue the common law claims in a state tribunal. *Id.* In this light, appellant's assertion that including the state contract claim might have prevented it from arguing that claim on the merits in the event of a dismissal from federal court is clearly incorrect. To the contrary, if appellant wished to preserve that claim, Rule 18 joinder was the proper device.

> Finally, we must reject appellant's contention that it is unfair to force pendent claims on federal trial courts. If this were so, then one may as well argue that the entire doctrine of pendent jurisdiction is unfair, since the effect of its application is to busy the federal court with matters of state law. *The primary purpose of the doctrine is to promote fairness to litigants and judicial economy by disposing of a controversy in a single proceeding.* . . . This, combined with the broad joinder provisions of the federal rules, gives appellant's argument a hollow ring."

657 F.2d at 946 (emphasis added) (citations omitted). *See also First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367, 1375-76 (11th Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 768 (1986) (following *Harper*); *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1200 n.1 (7th Cir. 1984), *aff'd*, 106 S. Ct. 1066 (1986) (Flaum, J. concurring) (while pendent jurisdiction is not compulsory *as to the Court*, it is compulsory as to the parties). We agree with Woolworth's assertion that the rationale for applying *res judicata* is even more compelling in this case than in *Harper*. While in *Harper* the plaintiff illegally split his claim when he did not assert pendent and hence, discretionary state claims along with his federal action, Shaver failed to assert a basis for jurisdiction (diversity) which had it proven to be applicable, a federal court would have no discretion to reject. *See, e.g., Hemmings v. Barian*, 822 F.2d 688, 693 (7th Cir. 1987). Since diversity jurisdiction is not a doctrine of discretion, but of plaintiff's right, any uncertainty over whether the trial judge would enter-

tain the claim that was present in *Harper* is absent from Shaver's situation.[2]

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[2] The dissent broadly asserts that *Harper* fails to answer the policy concerns implicated by our application of the *res judicata* doctrine to require a plaintiff who chooses the federal forum to allege *all* basis for jurisdiction in a single judicial proceeding. Initially, the dissent argues that our holding today does not serve the purposes underlying *res judicata* doctrine—judicial economy and the protection of defendants against the harassment of repetitive and duplicative lawsuits—since "if a federal claim is dismissed before trial (as here by summary judgment) the judicial burden is about equally onerous whether the pendent claims are then tried in federal or state court." The assertion that the policies underlying *res judicata* doctrine are not advanced by requiring a plaintiff to allege all possible bases for jurisdiction in a single judicial forum is simply not correct. Multiple lawsuits in separate forums, as well as requiring more than one court to analyze and digest the facts of a case, all have the effect of harassing defendants and wasting judicial manpower—the precise dangers the doctrine intends to prevent. "One major function of claim preclusion is to force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the *first suit*." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4408 at 65 (1981). Although peculiar problems of claim preclusion arise from the expansion of federal jurisdiction (e.g., pendent and diversity jurisdiction) affording federal courts jurisdiction to hear state law claims, the trend of recent decisions is to require a plaintiff to invoke all possible bases for jurisdiction in the first forum chosen. *Id.* § 4412. As explained in Wright and Miller, where "both state and federal courts have full independent jurisdiction over all theories, nothing in federal law limits state court jurisdiction, and the federal court has both federal question *and diversity jurisdiction*[; s]everal decisions have ruled that . . . there is a single claim, all parts of which must be presented to the first court chosen." *Id.* at 95 (emphasis added) (footnote omitted). Moreover, *Harper* directly answers the dissent's concern that our application of *res judicata* to jurisdictional questions will operate to force state claims upon the federal courts:

> ". . . we must reject appellant's contention that is unfair to force pendent claims on federal courts. If this were so, then one may as well argue that the entire doctrine of

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> pendent jurisdiction is unfair, since the effect of its application is to busy the federal court with matters of state law. *The primary purpose of the doctrine is to promote fairness to litigants and judicial economy by disposing of a controversy in a single proceeding.* . . . This, combined with the broad joinder provisions of the federal rules, gives appellant's argument a hollow ring."

657 F.2d at 946 (emphasis added).

The dissent also maintains that "most fundamentally, this is not a case of the *plaintiff's* splitting his claims," because the *court,* rather than Shaver, dismissed Shaver's pendent claims in his initial lawsuit against Woolworth. But this argument ignores the fact that it was the *plaintiff's* deliberate decision: (1) to initially choose the federal forum; and (2) to bypass his right to invoke the existence of diversity jurisdiction after dismissal of his federal question claim in federal court. Thus, contrary to the dissent's assertion, Shaver's attempt to institute two separate proceedings in different forums runs contrary to the rule against claim-splitting.

Finally, the dissent vaguely contends that the comity and federalism problems inherent in requiring a plaintiff to invoke the federal court's diversity jurisdiction after dismissal of federal question and pendent state law claims renders the rule unworkable. The dissent's only specific example of a comity and federalism problem is its concern that a state court may fail to apply a federal *res judicata* bar to pendent claims dismissed by a federal court, thus creating an incentive for the defendant to remove the case to federal court where the rule will be applied. Hence, the dissent asserts, a problem of forum-shopping.

This argument is unpersuasive for two reasons: (1) the concern that a state court may refuse to apply a federal rule of *res judicata* is inherent in the already accepted rule requiring a plaintiff to invoke the federal court's pendent jurisdiction where the plaintiff chooses the federal forum; and (2) the argument rests on the untenable assumption that state courts will in fact ignore the *res judicata* effect of the prior federal judgment. (Cases such as *Anderson v. Phoenix Inv. Counsel,* 440 N.E.2d 1164, 1167-70 (Mass. 1982) suggest otherwise. *Anderson,* a case factually analogous to *Harper,* ruled that the preclusive

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The doctrine of *res judicata* ensures that a controversy once decided becomes final. It is not a "mere matter of practice or procedure inherited from a more technical time than ours." *Moitie,* 452 U.S. at 398, 101 S. Ct. at 2427. Rather, because the doctrine "encourages reliance on judicial decisions, bars vexatious litigation and frees the courts to resolve other disputes," *Brown v. Felson,* 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979), it is considered a rule of "fundamental and substantial justice . . . which should be cordially regarded and enforced by the courts . . . ." *Moitie,* 452 U.S. at 401, 101 S. Ct. at 2429.

Because Shaver neglected to assert the existence of diversity jurisdiction in his prior action in order to pursue his breach of contract claims, both the strict test of and the policy behind the *res judicata* doctrine bars the

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effects of a federal judgment should be determined under *federal law,* and that the plaintiff's state claims were barred as a result of his failure to attempt to join them as pendent claims in a prior federal proceeding.) Should a state court refuse to apply a federal rule of *res judicata,* the mere fact that the federal court's removal jurisdiction provides a sure means of enforcing the claim preclusion consequences of a prior federal judgment is no reason to reject the federal rule. *Cf. Salveson v. Western States Bankcard Ass'n,* 731 F.2d 1423 (9th Cir. 1984) (removal jurisdiction invoked to enforce the *res judicata* effect of a prior federal judgment where plaintiff's state law claim was an "artfully pled" federal antitrust claim).

In sum, the alleged "parade of horribles" trotted out by the dissent is merely the logical result of the federal court's diversity jurisdiction and the policies underlying *res judicata* doctrine. While the dissent appears to agree with those commentators who advocate the abolition of diversity jurisdiction, such questions, because they are legislative in nature, should be decided by Congress, not by the courts. Thus, they should not be injected into the legal analysis.

present action. Although the facts of Shaver's situation (involving the failure to assert the existence of diversity jurisdiction) are unique, they nonetheless present a classic case for the application of the doctrine of *res judicata,* and in accordance with *Harper,* there is no policy justification for not applying the doctrine. Whatever hardship that may inhere in this result could have been avoided. Since Shaver originally chose the federal court as his forum, he should have, under the well-reasoned rule against claim-splitting, included all the relevant theories of relief in a single action that the federal forum provides. Both the federal court's diversity jurisdiction and the broad joinder provisions of the Federal Rules of Civil Procedure provided Shaver the opportunity to pursue his state law claims at the same time as his federal ADEA claim. His failure to pursue those claims in the forum originally selected precludes him from taking a second bite of the apple.

AFFIRMED.

CUDAHY, *Circuit Judge,* dissenting:

The majority has decided this difficult case on a wholly novel theory that was ignored by the district court. The majority purports to see the case as a matter of "traditional res judicata doctrine," *see supra* p. 7, preponderating over mere "policy arguments. But, of course, res judicata itself rests on well-known policy objectives. These policies seem to me not much furthered by the majority result nor are other important policies (such as those involving comity and considerations of federalism) adequately considered here. The majority opinion is little more than a ritual incantation against "claim splitting"

as a mechanical response to all the contradictions inherent in the problem before us.

The majority has declared that, when a plaintiff fails to plead diversity of citizenship as an alternative basis of federal subject-matter jurisdiction over claims otherwise pleaded as pendent, and the federal claim is dismissed and the state claims concurrently dismissed under *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the latter dismissals are res judicata of the state claims. Merely to state this apparent holding is to underline its novelty. First, I do not believe the majority's rule materially advances the policies underlying res judicata doctrine: judicial economy and protection of defendants against the harassment of repetitive and duplicative lawsuits. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata . . . encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes."). For, if a federal claim is dismissed before trial (as here by summary judgment) the judicial burden is about equally onerous whether the pendent claims are then tried in federal or in state court. The defendant's burden likewise is not altered significantly by the transferring of the state claims against him from federal to state court. (In fact, the pendent state claims may never be resurrected once they are dismissed in federal court.)

Second, and most fundamentally, this is not a case of the *plaintiff's* splitting his claims. He brought in federal court all the claims arising from the relevant nucleus of operative facts. But the *court*, pursuant to *United Mine Workers v. Gibbs*, dismissed the pendent claims, freeing the plaintiff to bring them in state court. The Fifth Cir-

cuit, in comparable circumstances, has explained the claim-splitting rule:

> Put another way, the rule—protective both of the court and of the defendant—precluding litigants from splitting causes has no function where the court itself, rather than the litigant, does the splitting and does it by reason of no default on the part of the litigant, who timely advanced all his claims in the initial proceeding.

Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 563 (5th Cir. 1983).

Third, the comity and federalism problems presented by the majority's approach are profound and cannot be explained away merely by citing *Harper Plastics v. Amoco Chems. Corp.*, 657 F.2d 939 (7th Cir. 1981). *Harper Plastics*, of course, says:

> [I]f the district judge finds that the federal claims are insubstantial, the entire action may be dismissed and the plaintiff will be permitted to pursue the common law claims in a state tribunal.

657 F.2d at 946. On this point, *Harper Plastics* merely follows *United Mine Workers v. Gibbs*. But the crucial question in the instant case is this: if the dismissed pendent claims are brought in the state court, must that court dismiss these claims as barred by the res judicata effect of the federal suit? To dismiss these claims, the state court would have to apply a purportedly federal res judicata bar (involving failure to invoke diversity jurisdiction) to a state cause of action brought, of course, in a state court. Such a requirement seems to me so disruptive of any notions of federalism that I cannot imagine

the Supreme Court's approving it. In fact, I have never heard of a state court's *requiring* a litigant to invoke the diversity jurisdiction (nor has such a requirement ever emerged from a *federal* court, for that matter).

Fourth, perhaps the "answer" to the third point, above, is that, while the state court need not find a res judicata bar, the case may be removed to federal court, which can and will apply res judicata. But this "solution" creates an obvious *Erie* problem. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The result clearly would depend entirely on the forum (a huge incentive to forum shopping). Federal courts would apply a putative federal res judicata rule and state courts would ignore it. This would be absurd.

The issues here of comity and federalism are so much more crucial than any issue of alleged claim splitting that the majority's outcome cannot stand.

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers v. Gibbs, 383 U.S. at 726 (footnotes omitted). In addition, of course, the majority here *requires* recourse to the diversity jurisdiction at a time when many authorities (notably including former Chief

Justice Burger) advocate the abolition of that jurisdiction.[1]

Essentially, the majority's res judicata analysis must fail because (1) the plaintiff did not split his claims (the court did) and (2) for good reason there is no authority anywhere that a plaintiff may be required to invoke the diversity jurisdiction.

On the merits, although the matter is close and I have the highest regard for Judge Curran's analysis of Wisconsin law, I believe the summary judgment must be reversed. Employee handbooks may be express contracts of employment in Wisconsin. *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985). The circumstances in *Fer-*

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[1] In one of his annual state of the judiciary reports, the former Chief Justice stated that

> diversity cases have no more place in the federal courts in the second half of the twentieth century, and surely not in the final quarter of this century, than overtime parking tickets or speeding on the highways simply because the highway is federally financed. . . . In any event, nonfederal cases must be decided under state law and can best be handled by state judges. They are at least as familiar with that law as federal judges. Appeals in such cases can better be reviewed by those state judges than federal judges from other states.

Burger, Annual Report on the State of the Judiciary, 1976 A.B.A. J. 443, 444. For a description of the debate and citations of articles written in favor of retaining or abolishing diversity jurisdiction, see C. Wright, *The Law of Federal Courts*, 127-37 (4th ed. 1983).

My purpose in citing these authorities is simply to show that the majority is swimming upstream in terms of much current thinking about diversity jurisdiction. I would hasten to add that I continue to regard that jurisdiction as important and have never advocated its abolition. In any event, despite the assertions of the majority, I am unaware of a "trend" in the law toward the mandatory invocation of diversity jurisdiction.

raro are analogous in many ways to the facts of the case before us. For example, both Ferraro and Shaver had agreed in their employment applications that they could be terminated at any time. *Id.* at 158, 368 N.W.2d at 669; Brief of Plaintiff-Appellant at 7. Ferraro, however, received a handbook that "require[d] that employees not be dismissed or laid-off without just cause." 124 Wis. 2d at 159, 368 N.W.2d at 669. Shaver also received a handbook; it provided that Woolworth would lay off employees only on the basis of seniority:

> It is important for you to know that if a reduction of staff should be necessary, lay-off and recall after lay-off *will be determined on the basis of seniority* and an employee's skill and ability to do the available work. Where the factors are relatively equal among several employees, those with the greatest seniority will be given preference over those employees with less seniority.

Appendix of Defendant-Appellee at 9 (emphasis added).[2]

Both Shaver and Ferraro signed written acknowledgements of receipt of their handbooks. Ferraro's stated that he understood "the policies and rules and accept[ed] them as a condition of [his] continued employment." 124 Wis. 2d at 158, 368 N.W.2d at 669. Although Shaver's Acknowl-

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[2] The Supreme Court of Wisconsin found a similar provision in Ferraro's handbook to be evidence of a contractual limitation of the at-will relationship:

> That this was an abrogation of an at-will relationship, if such were originally intended, is clear from the language of the handbook. For example, the [employer] promised that, in the event of layoffs, any layoff "will be based on your seniority."

124 Wis. 2d at 165, 368 N.W.2d at 672.

edgement Form did not condition his employment on the terms of the handbook, Woolworth had prefaced the booklet as follows:

> This booklet will assist you in understanding our policies and procedures, and will explain many aspects of your duties in the Central Accounting Office. *It will tell you what we expect from you, and what you may expect from us.*

Appendix of Defendant-Appellee at 3 (emphasis added).

Finally both handbooks contained express promises from the employee. *See, e.g.,* 124 Wis. 2d at 166, 368 N.W. 2d at 672 (two-week notice prior to leaving); Appendix of Defendant-Appellee at 4 (telephone notification of absence prior to starting time).

In *Ferraro,* the Supreme Court of Wisconsin considered these factors and instructed courts "to examine the nature of the handbook" to determine whether it created an express contract. 124 Wis. 2d at 167, 368 N.W.2d at 673. The court then held that

> whatever the original relationship between the parties —and it is apparent that if no other evidence were available than that in the original application for employment, the relationship would be "at will"—the promises in the handbook, coupled with the return promises of the employer, Ferraro, resulted in an express contract incorporating all the provisions thought desirable by the employer in respect to obligations of the employee, misconduct, and employee discipline and discharge.

Id.

In the present case, the provision of the handbook outlining the seniority policy, in conjunction with its preface

of mutual expectation, arguably created an enforceable agreement between the company and its employees. Therefore, under *Ferraro,* I believe summary judgment is inappropriate in this case.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FRANK B. SHAVER,

Plaintiff, Case No. 86-C-285

v.

F.W. WOOLWORTH CO.,

Defendant.

DECISION AND ORDER

On September 24, 1982, the F.W. Woolworth Co. announced its decision to close its Woolco Division, which consisted of 336 stores and, as Woolworth claims, resulted in the largest liquidation in the history of retailing. At the time the decision was made, Frank Shaver was employed at Woolworth's Central Accounting Office (CAO) in Milwaukee, Wisconsin as a leasing specialist. He had been a Woolworth employee for over twenty years. The Woolco liquidation necessitated massive layoffs, including 183 of 673 employees in the CAO. On October 27, 1982, Frank Shaver was informed at a group meeting that he was being laid off. Many of the affected employees, including Shaver, were asked to remain for certain periods of time, apparently to assist in the winding down process and in training replacements. Shaver's last day of work was June 30, 1983.

Shaver commenced an action in this court on May 2, 1984, premising jurisdiction on the Age Discrimination in Employment Act, 29 U.S.C., Section 621 et seq. The complaint also purported to state pendent state claims, in-

cluding breach of contract, deprivation of plaintiff's reasonable reliance, negligent termination, intentional misrepresentation and intentional infliction of emotional distress. By order dated August 21, 1985, this court granted the defendant's motion for summary judgment on the grounds that the plaintiff's claim was time barred. The court further declined jurisdiction of the pendent state claims.

On February 13, 1986, Shaver commenced an action in the Milwaukee County Circuit Court, which complaint alleged breach of contract, negligent termination, and a violation of the Wisconsin Fair Employment Practices Act. The defendant petitioned for removal to this court, invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332 On June 6, 1986, the defendant moved for summary judgment on all three claims in the complaint. A scheduling conference was conducted shortly thereafter, during the course of which counsel for the plaintiff requested a period of time in which to pursue discovery on the summary judgment motion. The court granted the plaintiff's request and the matter is now fully briefed and ripe for decision.

W.F.E.A.

The defendant has effectively argued that the plaintiff's state law age claim, arising under the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31 et seq. ought to be dismissed because the WFEA does not provide a private cause of action. The plaintiff has conceded that it does not and states that he is now actively pursuing his case before the Equal Rights Division. Accordingly that claim will be dismissed.

NEGLIGENCE

The defendant next argues that Wisconsin courts do not recognize negligence as a cause of action in an employment termination case. The defendant relies principally upon the Wisconsin Supreme Court decisions in *Brockmeyer v. Dunn & Bradstreet,* 113, Wis. 2d 561, 335 N.W.2d 834 (1983) and *Landwehr v. Citizens Trust Co.,* 110 Wis. 2d 716, 329 N.W.2d 411 (1983) and the Wisconsin Court of Appeals decision in *Dvorak v. Pluswood, Wisconsin,* 121 Wis. 2d 218, 358 N.W.2d 544 (Ct. App. 1984) for the proposition that Wisconsin courts have foreclosed negligence claims in employment termination cases.

Landwehr addressed a plaintiff's dilemma who wishes to maintain that a contract has been performed improperly, i.e. whether his action sounds in contract or tort. The court noted the legal anomaly in which an action for tort may lie when misperformance of a contract results in foreseeable unreasonable risk of harm to the plaintiff and the proposition that foreseeable injury or damage exists in virtually all potential breaches of contract. The court distinguished *Colton v. Foulkes,* 259 Wis. 142, 47 N.W.2d 901 (1951) on the basis that the defendant had a duty independent of the contract. The father of the plaintiff in *Landwehr* was found not to have a duty to make a will and thus his failure to execute it properly did not form the basis for an action sounding in tort.

In *Brockmeyer,* the Wisconsin Supreme Court adopted a narrow public policy exception to the employment at will doctrine wherein an action would lie for a plaintiff-employee who maintains that his wrongful discharge "violates a clear mandate of public policy." *Brockmeyer,* 113

Wis. 2d at 574. The court immediately resolved the question of whether such an action should be maintained in tort or in contract and concluded "that a contract action is most appropriate for wrongful discharges. The contract action is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Tort actions cannot be maintained." *Id.* at 575-76. The Wisconsin Court of Appeals in *Dvorak v. Pluswood, Wisconsin, Inc.*, 121 Wis. 2d 218, 358 N.W.2d 544 (1984) employed both *Landwehr* and *Brockmeyer* in concluding that a termination case is not actionable in tort because the employer had no duty to its employee independent of the employment contract and thus the award for punitive damages was reversed.

The plaintiff denies that he is attempting to end-run the clear language in *Brockmeyer* and that his claim is not that of a tortious bad faith employment discharge. "Our claim is, rather, that having undertaken the task of differentiating between its employees for purposes of assessing who shall survive the Woolco lay-off at the CAO and who shall not, the defendant obligated itself to carry out that undertaking with reasonable care, including the careful application of the principles of lay-off set forth in its employee handbook." Plaintiff's brief at 2-3 (footnote omitted). The court views the plaintiff's argument as being a distinction without substance.

The plaintiff would next have the court read *Wandry v. Bull's Eye Credit*, 129 Wis. 2d 37, 384 N.W.2d 525 (1986) and conclude that the public policy of Wisconsin, as expressed statutorily, would be offended if he is not

permitted to proceed in negligence. In *Wandry* the plaintiff had been fired because she refused to reimburse her employee for a bad check that she had cashed, not realizing that the check had been stolen and the endorsement forged. She allegedly had only cashed the check after her supervisor had approved it and she was acting in accordance with her employer's usual and customary procedures. Wisconsin Statute section 103.455 prohibits employers from making deductions from the wages due or earned of its employees unless it has first been determined that the loss experienced by the employer has been caused by the employee. The *Wandry* court concluded that section 103.455 "articulates a fundamental and well defined public policy proscribing economic coercion by an employer upon an employee to bear the burden of a work-related loss when the employee has no opportunity to show that the loss was not caused by the employee's carelessness, negligence or willful misconduct." *Id.* at 47. Thus, although the employer did not technically violate the statute by deducting wages, it terminated the employment of the plaintiff for not reimbursing it from her own assets.

Shaver attempts to make the startling transition, which would have this court recognize the comparative negligence statute, section 895.044 Wis. Stats., as stating a fundamental Wisconsin public policy which was somehow violated by the plaintiff's termination. If the reader has difficulty in following this argument, he or she is not alone. It is the court's understanding that the public policy underlying the comparative negligence statute is that a contributorily negligent plaintiff will not be barred from maintaining his action unless his negligence was greater than the negligence of the defendant, even though dam-

ages will be reduced. By no interpretation of the complaint can the court conclude that the defendant's decision to lay off the plaintiff violated the public policy behind the comparative negligence statute. As to the plaintiff's argument that the cases recognizing an exception to the employment at will doctrine should not be read "*sub silentio* to overrule preexisting general principals of comparative negligence law," the court can only state that it is unaware of any authority which would have permitted the plaintiff to maintain his action in negligence prior to *Brockmeyer*. The court further rejects *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982) as authority applicable under *Erie* in Wisconsin.

BREACH OF CONTRACT

The plaintiff's claim sounding in breach of contract is on somewhat firmer footing. In *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985), the Wisconsin Supreme Court joined several other jurisdictions[1] which

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[1] *See for example, Fletcher v. Wesley Medical Center*, 585 F. Supp. 1260 (D. Kan. 1984); *Leikvold v. Valley View Community Hospital*, 141 Ariz. 544, 688 P.2d 170 (1984) (en banc) *Pugh v. See's Candy, Inc.*, 166 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Salimi v. Farmers Insurance Group*, 684 P.2d 264 (Colo. Ct. App. 1984); *Jackson v. Minidoka Irrigation District*, 98 Idaho 330, 563 P.2d 54 (1977); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983); *Finnett v. Hie Food Products, Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S. 2d 193 (1982); *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1976); *Osterkamp v. Alkota Manufacturing, Inc.*, 332 N.W.2d 275 (S.D. 1983); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc).

have recognized that an employee handbook may, under certain circumstances, constitute an implied or express employment contract limiting the employer's right to terminate at will, i.e. for any reason or for no reason at all.

On Shaver's application form, which is not dated but presumably was completed in 1962, the plaintiff signed his name directly beneath the following language:

> On my engagement by F.W. Woolworth Co., this application is evidence that I agree to conform to the rules and regulations of F.W. Woolworth Co., that my engagement can be terminated at any time by F.W. Woolworth Co., I being likewise at liberty to so terminate it. Any agreement entered into between the company and the applicant is predicated upon the truthfulness of the statements herein contained.

It appears uncontroverted that the CAO Employee Handbook then in effect contained the following passage: "This booklet will assist you in understanding our policies and procedures, and will explain many aspects of your duties in the Central Accounting Office. It will tell you what we expect from you, and what you may expect from us." There is no language in this handbook concerning seniority and its effect upon layoff.

On March 16, 1982, Shaver signed an acknowledgement form verifying his receipt of a copy of the new employee handbook which contained "details of benefits and policies for the employees of the F.W. Woolworth Central Accounting Office." In its introductory statement, the booklet provided as follows: "This booklet will assist you in understanding our policies and procedures, and will explain many aspects of your duties in the Central Account-

ing Office. It will tell you what we expect from you, and what you may expect from us."

The 1982 handbook, however, in addition to listing the rules and benefits concomitant with being a CAO employee, contained the following seniority section:

> Your seniority is important to you and to the Central Accounting Office and it means the length of time you have worked for us since your most recent date of hire. Seniority, along with ability and performance, is an important factor for job transfer and promotion opportunities. In the history of the CAO the need to reduce the number of employees has occurred on rare occasion—and even then only a few employees were affected. It is important for you to know that if a reduction of staff should be necessary, layoff and recall after layoff will be determined on the basis of seniority and an employee's skill and ability to do the available work. Where the factors are relatively equal among several employees, those with the greatest seniority will be given preference over those employees with less seniority.

The handbook's penultimate paragraph contains the following caveat: "These are today's policies and rules—it is safe to say, our practice is to continually review and revise them as needed—always keeping in mind the needs of the people who make up the organization."

The defendant bases his argument that summary judgment ought to be granted on the breach of contract claim on three grounds. First that the CAO handbook did not constitute a contract because performance under the handbook was optional with the employer and did not change the nature of the at will employment relationship. Second, that if the handbook constituted a contract, it was modi-

fied by the employer when it issued its notice of layoff and accepted by the plaintiff when he continued to work at the CAO and accepted the layoff benefits package, and third, that if the handbook is found to be an employment contract, *Ferraro v. Koelsch* ought not to be applied retroactively.

While the court is not prepared to state that any one of the circumstances surrounding the plaintiff's layoff would be sufficient to defeat the defendant's summary judgment motion, I must find that the combination of factors mandate the grant of summary judgment. First of all, the employee handbook did not change the employment at will relationship between the parties. Woolworth remained free to terminate Shaver's employment at any time for any reason or for no reason at all as long as the reason itself was not illegal. The Seniority Section in the handbook referred only to layoffs and not to discharges. Second, the defendant did reserve the right to review and revise the policies and rules in the handbook as it saw fit. Again it must be stressed, however, that this court is not holding that such language of disclaimer by and of itself will be sufficient to remove an employee handbook from the ambit of the *Ferraro* decision.

Finally, the court is persuaded by the fact that at the meeting on October 27, 1982, Shaver was given a packet of materials including the announcement of the layoffs, an explanation of the income continuation program which was designed to supplement or extend unemployment compensation while the laid off employees were seeking other jobs, the program for continuation of other benefits, such as insurance and bonuses, and an explanation of the out-

placement services to which the laid off employees would have access. In a document entitled "Questions and Answers Related To Woolco Phase Out" the defendant made it clear that the layoffs were not based upon seniority.

> Q. Why has my employment with Woolworth/Woolco been terminated and not someone else? I have more seniority than others who are staying on. I've done my job(s) well.
>
> A. The problem is not just your job, but involves management, staff and operating jobs across the country. Everyone was carefully reviewed for the jobs that will remain. The decisions were made by management based on their knowledge of future job requirements and the people in the organization. Individual decisions were based on the best combination of job knowledge, performance track record, breadth and depth of experience, as well as company service. Regretable, (sic) there just aren't enough jobs available in the new organization to hold on to all of our competent people.

The plaintiff accepted the layoff benefits and continued to work for the defendant until June 30, 1983. It would thus appear to the court that the defendant reserved the right to modify this particular term of employment, did modify the seniority section and that by accepting the layoff package and continuing to work for the defendant the plaintiff accepted the modification. This case is thus distinguishable from *Bartinikas v. Clarklift of Chicago North, Inc.*, 508 F. Supp. 959 (N.D. Ill. 1981) in which the court found that the employer attempted to modify the employment contract but that the unilateral modification was specifically rejected by the employee. Accordingly, and for all the foregoing reasons,

IT IS ORDERED that the defendant's motion for summary judgment be and hereby IS GRANTED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 3rd day of December, 1986.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 2, 1988.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

FRANK W. SHAVER,	)	Appeal from the
	)	United States
Plaintiff-Appellant,	)	District Court for
	)	the Eastern
No. 87-1043 vs.	)	District of
	)	Wisconsin.
F. W. WOOLWORTH COMPANY,	)	
	)	No. 86-C-285
	)	THOMAS J.
Defendant-Appellee.	)	CURRAN, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 5, 1988.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

FRANK W. SHAVER, Plaintiff-Appellant,	) Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 87-1043 vs.	
F.W. WOOLWORTH CO., Defendant-Appellee.	) No. 86 C 285 Thomas J. Curran, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-en-

titled cause by plaintiff-appellant, a vote of the active members of the Court was requested, and a majority* of the active members of the Court have voted to deny a rehearing *in banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Cudahy, Judge Flaum, and Judge Ripple voted to grant a rehearing *in banc*.

(2)

No. 88-225

In The
Supreme Court of the United States
October Term, 1988

FRANK B. SHAVER,

Petitioner,

v.

F. W. WOOLWORTH CO.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 LISTING

Respondent F. W. Woolworth Co. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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MISCELLANEOUS

No. 88-225

In The
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Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent F. W. Woolworth Co. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case. That decision is reported at 840 F.2d 1361 (7th Cir. 1988).

STATEMENT OF CASE

This case arises out of petitioner's claim-splitting. Petitioner originally filed a lawsuit (*Shaver I*) in federal court based on the termination of his employment. He invoked federal question jurisdiction pursuant to the Age Discrimination In Employment Act (29 U.S.C. §§ 621 *et seq.*) and alleged pendent state claims. The district court granted summary judgment to respondent on the federal claim and *sua sponte* declined to exercise pendent jurisdiction over the state claims. Petitioner,

aware of the availability of diversity jurisdiction,[1] failed to assert this mandatory basis of jurisdiction and allowed a final judgment to be entered. He neither moved the district court in *Shaver I* to accept diversity jurisdiction over the case nor appealed the judgment.

Petitioner then filed a separate action in state court (*Shaver II*) again alleging those state claims arising out of his termination of employment. Respondent removed the case to federal court on the basis of diversity jurisdiction. Following the district court's grant of summary judgment to respondent on the merits, the Seventh Circuit held that petitioner's contract claim in *Shaver II* was barred by res judicata.[2] Petitioner's motion for reconsideration was denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioner advances four arguments in support of his petition for certiorari, each of which suffers from the same defect: he has ignored the existence of diversity jurisdiction and argued this case as if pendent jurisdiction were the only possible predicate for his state claim. Criticially, not only was diversity jurisdiction available in *Shaver I* but also petitioner

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[1] "The record establishes that Shaver in fact knew that diversity jurisdiction existed in the prior age discrimination lawsuit. As part of his discovery in *Shaver I*, Shaver inquired into the factual basis for Woolworth's denial of diversity jurisdiction. In its response, Woolworth stated that it had not denied the existence of diversity jurisdiction, and explained its belief that diversity jurisdiction did exist. Nevertheless, Shaver did not amend his complaint to include diversity of citizenship as a jurisdictional basis." *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361, 1364 n.1 (7th Cir. 1988).

[2] Having decided to affirm the district court in *Shaver II* on that basis, the appellate court did not reach the trial court's rationale for granting summary judgment on petitioner's contract claim (which was the only issue petitioner raised on appeal). *See Shaver II*, 669 F. Supp. 243, 246-47 (E.D. Wis. 1986). The trial court had granted summary judgment to respondent on the merits without reaching the res judicata issue, which also had been raised by respondent.

undeniably knew that is was and chose not to utilize that jurisdictional basis. It was this choice of the petitioner not to invoke the diversity jurisdiction of the federal court in *Shaver I* that dictated the application of res judicata in *Shaver II*.

As demonstrated below, this petition for certiorari should be denied. The arguments for granting the writ are based on issues that are not properly presented by the facts in this case.

I. This Case Does Not Implicate, Much Less Conflict With, *United Mine Workers v. Gibbs*

Petitioner correctly argues that a dismissal of pendent claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), does not have preclusive effect. That, however, is fundamentally irrelevant. Petitioner knew that he had diversity jurisdiction available and declined to utilize that basis for jurisdiction of the state-law claims in *Shaver I*. *See supra* note 1. Unlike non-diverse plaintiffs whose sole jurisdictional predicate for their state-law claims is the discretionary doctrine of pendent jurisdiction, petitioner could have asserted diversity jurisdiction, which is mandatory. *Carnegie-Mellon University v. Cohill*, ____U.S.____, 108 S.Ct. 614, 622 (1988). His voluntary decision not to invoke diversity jurisdiction is what makes res judicata appropriate here. This is, moreover, in accord with the Restatement (Second) of Judgments § 25 comment e (1982): "When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action . . ."

His collateral contention that the order of dismissal in *Shaver I* was not "on the merits with respect to the state-law breach of employment contract claim" (Petition at p. 9) is likewise immaterial. The absence of a decision on the merits on that claim is the inevitable consequence of claim-splitting and cannot militate against the bar of res judicata. There was,

as the Court of Appeals found, a final judgment on the merits with respect to petitioner's federal age discrimination claim; his state-law claim arose out of the same operative event — his layoff; and that claim could have been presented under the court's diversity jurisdiction. Res judicata does not require more. As this Court held in *Brown v. Felsen*, 442 U.S. 127, 131 (1979), "[r]es judicata prevents litigation of all grounds for . . . recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."

II. This Case Does Not Involve A Misapplication of *Federated Dep't Stores, Inc. v. Moitie*

Even if, as petitioner suggests, this Court's decision in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) left an open question on whether unpresented pendent claims are exempt from res judicata, that issue is not presented here. The issue here is whether unpresented diversity claims are exempt from res judicata. As the Court of Appeals held below: "[s]ince diversity jurisdiction is not a doctrine of discretion, but of plaintiff's right, any uncertainty over whether the trial judge would entertain the [unpresented pendent] claim that was present in *Harper [Plastics v. Amoco Chemical Corp.*, 657 F.2d 939 (7th Cir. 1981)] is absent from Shaver's situation."[3] *Shaver v. F. W. Woolworth Co.*, 840 F.2d at 1366.

Alternatively, petitioner argues that regardless of the holding in *Federated Dep't Stores, supra*, his case warrants an exception to preclusion. That argument, however, was cogently rejected by the Seventh Circuit because it "ignores the fact

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[3] *Federated Dep't Stores, supra*, moreover, involved a setting parallel to that in *Harper Plastics, supra*. In both cases, the plaintiffs failed to present pendent state claims in conjunction with their original federal anti-trust claims and faced res judicata bars in their subsequent efforts to raise such state claims in separate suits.

that it was the plaintiff's deliberate decision: (1) to initially choose the federal forum; and (2) to bypass his right to invoke the existence of diversity jurisdiction . . . " *Shaver v. F. W. Woolworth Co.*, 840 F.2d at 1366 n. 2. Indeed, just as in *Federated Dep't Stores, supra*, "this case is clearly not one in which equity requires that the doctrine give way"; petitioner was "not 'caught in a mesh of procedural complexities' " but "made a deliberate tactical decision" by which he should be bound. 452 U.S. at 403 (Blackmum concurring) (citations omitted).

III. There Is No Conflict In The Circuits

Contrary to petitioner's assertion, the Seventh Circuit's decision below does not conflict with the Fifth Circuit's decision in *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983) (en banc). There is no disagreement as to the controlling principle: "claims which the litigant was unable, *through no fault of his own*, to try out in the federal proceeding should be held not precluded." *Id.* at 563 (emphasis added). There, the Fifth Circuit found (as did the Seventh Circuit here) that it was the plaintiff who was responsible for claim-splitting. Nilsen belatedly attempted to amend her complaint to add a § 1983 claim to her pending Title VII claims. That amendment was rejected and her subsequent separate suit raising her § 1983 claim was held barred by res judicata. The Fifth Circuit concluded that "[t]he system itself was, in and of its nature, ready and able to accommodate all such claims, if timely made, and obliged to entertain them: had the [additional] theory been so advanced, the court would have had no choice but to adjudicate it." *Id.* That holding is fully in accord with the Seventh Circuit's instant decision: "Shaver failed to assert a basis for jurisdiction (diversity) which . . . a federal court would have no discretion to reject." *Shaver v. F. W. Woolworth Co.*, 840 F.2d at 1366.

Where, as here, the claim-splitting is self-induced, the circuit courts are uniform in enforcing the res judicata bar. *See, e.g., Harper Plastics v. Amoco Chemical Corp., supra* (failure to assert discretionary pendent claims barred a second action); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same); *Cemer v. Marathon Oil Company*, 583 F.2d 830 (6th Cir. 1978) (failure to assert diversity claim in original federal question suit barred subsequent suit); *Kimmel v. Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987) (failure to assert federal question claim in original diversity action barred subsequent suit); and *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) (failure to timely amend federal question suit to add state claims precludes separate suit). "The governing principle is that a party will not be permitted to litigate matters he has already had an opportunity to litigate, whether or not he actually took full advantage of that opportunity." *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 582 (N.D. Cal. 1981), *aff'd in relevant part*, 731 F.2d 1423 (9th Cir. 1984).

IV. This Case Is Of Limited Significance

This decision neither "converts judicially controllable discretionary jurisdiction into mandatory jurisdiction" nor "eliminates trial court discretion whether to exercise jurisdiction over [pendent] state law claims" (Petition at p. 11). Indeed, this case has no impact on purely pendent claims; its scope is limited to those occurrences where a court has both federal question and diversity jurisdiction, but the plaintiff knowingly fails to invoke the court's diversity jurisdiction. This case, accordingly, presents no more than a curious pleading choice. *See* Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 337-38 (1978) ("Forfeiture of legal rights for failure to assert them at the appropriate time is no novel phenomenon.

It is the very foundation of statutes of limitations and of time limits on the filing of appeals . . . Res judicata policy demands no less.")

There is concomitantly, no valid issue of comity or docket control. Diversity jurisdiction "is not discretionary" and, thus, if raised, "the District Court could not properly have eliminated the case from its docket" for reasons of comity or docket control. *Carnegie-Mellon University v. Cohill, supra,* 108 S.Ct. at 622. Indeed, having initially chosen the federal forum, petitioner's belated concerns are pretextual excuses for an absolute right to engage in a combination of forum-shopping and claim-splitting which the doctrine of res judicata forecloses by design.

CONCLUSION

This petition poses no new or important issue warranting review by this Court because the practical effect of this case beyond the petitioner is negligible, at best. Rarely, if ever, will a plaintiff who initially chose to bring federal and state claims in federal court under federal question and pendent jurisdiction, voluntarily and knowingly allow the court to dispose of his remaining state claims when mandatory diversity jurisdiction existed. The policies underlying res judicata, moreover, preclude a plaintiff in this situation from splitting his claims in order to forum-shop as the petitioner herein is attempting to do.

This petition for certiorari should, accordingly, be denied because it fails to satisfy any of the criteria of Supreme Court Rule 17; the issue is of extremely limited significance; and the decision below is clearly supported by the existing law and applicable policy considerations.

Respectfully submitted,

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